

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Policies and Rules Concerning)
Unauthorized Changes of Consumers')
Long Distance Carriers)

CC Docket No. 94-129

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Reply Comments of One Call Communications, Inc.
To
Notice of Proposed Rulemaking

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Dated: February 8, 1995

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REPLY COMMENTS TO NOTICE OF PROPOSED RULEMAKING

One Call, by its attorneys, hereby replies to the comments filed in response to the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking ("NPRM"),¹ initiated to review the Commission's policies and propose rules regarding unauthorized Primary Interexchange Carrier ("PIC") changes. One Call, an interexchange carrier providing tariffed intrastate, interstate and international 1+ and 0+ services, shares the views of a majority of the parties commenting on this proceeding that the Commission should avoid substantial modifications to its PIC change rules.

I. Introduction and Summary

In its NPRM, the Commission requested comments on a myriad of proposed regulations that would place undue strictures on a long distance provider's ability to market and promote its services. The Commission's suggestion for improving letters of agency ("LOAs") via its existing content requirements is sufficient to avoid most instances of consumer confusion. Other proposed regulations are unnecessary and are not demonstrably related to improving consumer satisfaction with the PIC change process.

¹Adopted and released on November 10, 1994.

Restricting the use of inducements or joint marketing agreements with underlying carriers can only hurt small IXCs in the competitive marketplace. Hundreds of small IXCs currently provide resale long distance service to consumers, encouraging lower prices and the development of innovative services in the industry. In order to compete with the "Big Three"² carriers however, these resellers must be afforded substantial flexibility in the way they market their services. The imposition of undue LOA form restrictions will only benefit the large, established carriers that currently control 85% of the long distance market.³ Accordingly, if an LOA contains the content elements already required under the Commission's rules, and is not false or misleading, it should be found valid, regardless of the inducement or other incentive it may contain.

Twenty-eight parties filed in response to the Commission's NPRM, the majority of which oppose the implementation of the proposed additional PIC change rules. Parties opposed to the rule changes include both large and small interexchange carriers ("IXCs") and reseller's organizations and associations.⁴ Some parties, such as Bell Operating Companies ("BOCs") and state public utility or service commissions, filed comments in support of many of the dramatic rule changes.⁵ Some large interexchange carriers, such as Sprint and LDDS, which will benefit

²AT&T, MCI and Sprint.

³Edmund L. Andrews, "Telephone Price War Heats Up", *The New York Times*, Section 1, Page 39, Column 6; Business/Financial (January 7, 1995) (Attached hereto).

⁴See Comments of Touch 1 Communications, America's Carriers Telecommunications Association (ACTA), CompTel, Home Owners Long Distance, Inc. (HOLD), Frontier Corporation, AT&T, ACC Corporation, Hi-Rim Communications, Telecommunications Resellers Association, L.D. Services, Inc., Communications Telesystems, Inc., MidCom, Communications, MCI, Sprint (in part) and GTE.

⁵See Comments of the New York Public Service Commission, Consumer Action, Allnet, the Missouri Public Service Commission, LDDS, Southwestern Bell Telephone Company and NYNEX.

from the addition of burdensome administrative requirements on small resellers, also filed comments supporting some of the rules proposed in the NPRM. The parties' differences underlie the tenuous competitive balance at stake in this proceeding.

The commenting parties almost unanimously agree that there is no need to promulgate different rules for business LOAs;⁶ that customers incorrectly PIC'd should be liable for the charges they would have paid if their PIC had never been changed;⁷ and that the Commission's telemarketing PIC change rules should not apply to customer-initiated calls to an IXC's 800 telephone number.⁸ The comments reflect a general consensus, with a few notable, self-serving exceptions, that IXCs should retain flexibility in marketing their services to both residential and business customers.

II. Discussion

A. Regulatory Background Demonstrates That the Proposed Changes are Not Linked to Specific Consumer Concerns

The Commission's recent NPRM was surprising in light of its findings in the PIC Verification Order dated January 9, 1992.⁹ In that Order, the Commission explicitly declined to regulate the form of the LOA, preferring to regulate only the content "in order to allow IXCs flexibility in their business operations while providing consumers protection against

⁶The only dissenting commenters include Southwestern Bell Telephone Company and the New York Public Service Commission.

⁷The only dissenting commenters were HOLD, Southwestern Bell Telephone, NYNEX, Allnet, the New York Public Service Commission, the California Public Utilities Commission and Consumer Action.

⁸The only dissenting commenters were Allnet, the New York Public Service Commission, Consumer Action, and the National Association of Attorneys General.

⁹*In the Matter of Policies and Rules Concerning Changing Long Distance Carriers*, CC Dkt. No. 91-64, *Report and Order*, 7 FCC Rcd. 1038 (1992) ("PIC Verification Order").

unauthorized PIC changes."¹⁰ The Commission recognized that only three IXC's control 85% of the long distance market and therefore determined that a small carrier should be permitted to market its services with tremendous flexibility, in order to compete for new customers, so long as the LOA used is not false or misleading. Nothing has changed since that determination. To the contrary, competition for long distance service has flourished and competitive rates and innovative services for consumers have been the results.

Furthermore, when an IXC obtains an executed LOA, the Commission has stated that it is entitled to presume that the customer has "read its contents" and understood "the nature and extent of the service relationship with the IXC."¹¹ This principle dictates that IXC's should continue to have marketing discretion and control over the form of their LOAs provided they are neither fraudulent nor deceptive. The modifications the Commission suggests not only decrease the flexibility of IXC business operations, but place the entire burden of culpability for customer complaints on the IXC's, removing any individual responsibility to read and understand a document prior to signing it.

The numerous and massive modifications to the PIC change rules, which contravene the Commission's earlier findings, appear to be based on the 4,200 complaints received by the Commission in 1993 and 1994 for "allegedly unauthorized or unknowingly authorized" PIC changes.¹² However, neither the Commission, nor any commenter, has demonstrated a nexus between these consumer complaints and the changes under consideration. Moreover, commenters such as AT&T, Sprint, and MCI believe that the Commission already possesses

¹⁰PIC Verification Order at 3219.

¹¹*In re Investigation of Access and Divestiture Related Tariffs*, CC Dkt. No. 83-1145, Phase I, 101 F.C.C. 2d 935, 938 (1985).

¹²NPRM at para. 1.

adequate enforcement measures to prevent the types of abuses it cites and should use them before attempting a complete overhaul of the PIC change rules.¹³ One Call notes that the vast majority of these complaints may be the result of "slamming" practices which are prohibited under the current rules, and so enforcement, not rule changes, is the best way to deter future PIC change abuses.

B. IXCs Should Have the Discretion to Market Their Services in any Manner Which is Not False or Misleading

The proposed rules will not rid the long distance industry of all PIC change abuse. Instead, they will unduly penalize small carriers that provide their customers with viable, efficient and low-cost alternatives to the services provided by the "Big Three" carriers. The proposed new rules regarding the form and content of LOAs are anti-competitive and will unduly burden small IXCs by disproportionately raising their administrative costs and by unreasonably restricting their ability to use marketing inducements to attract customers from larger and more dominant IXCs. Neither the content nor the form of the LOAs should be subject to additional regulation.

1. The Content Required in LOAs

One Call supports the use of existing content requirements for LOAs. This requirement meets the Commission's dual goals of protecting consumers and allowing competition to flourish in a flexible regulatory environment. While the existing content requirements meet these goals, additional restrictions do not. The Commission need not require that a specific LOA be used by all IXCs. Carriers should be permitted to choose any language for their LOAs that conforms clearly and unambiguously with the content elements currently mandated by the Commission. A non-technical caption identifying the purpose of the LOA may be appropriate. These measures

¹³See Comments of AT&T at pages 5-8, Comments of Sprint at page 2, Comments of MCI at page 4.

ensure that the LOA will satisfactorily fulfill some of the commenters' goal that an LOA "facilitate customer understanding that they are signing a document that will result" in a PIC change¹⁴ without the imposition of overly restrictive regulations.

A few supporters of the NPRM maintain that the Commission should designate the specific language and format for LOAs.¹⁵ Mandating specific legalistic language is unnecessary and may confuse consumers desiring to change IXC's. Such a requirement would also impose tremendous financial burdens on small IXC's which would be forced to discard and or modify otherwise valid LOAs simply because they do not conform to the Commission's latest version.

2. The Form of the LOAs

a. Inducements

Small IXC's must constantly offer their customers a new variety of innovative service packages in order to stay competitive. They market their services through the use of contests, checks, and other promotions, such as free frequent flier mileage. These tools are also frequently employed by even the largest carriers. In fact, last year, AT&T spent over \$150 million advertising a new service plan and PIC changed thousands of customers by offering them checks for \$75 if they left their current carrier.¹⁶ The Commission itself has recognized that inducements can be "proper and effective marketing devices for attracting customers to an IXC's service."¹⁷

¹⁴See Comments of LDDS at page 4.

¹⁵See Comments of LDDS, Southwestern Bell Telephone Company, NYNEX, the Missouri Public Utilities Commission, Allnet, Consumer Action, National Association of Attorneys General.

¹⁶Edmund L. Andrews, "Telephone Price War Heats Up", *The New York Times*, Section 1, Page 39, Column 6; Business/Financial (January 7, 1995) (Attached hereto).

¹⁷NPRM at para. 12.

Some commenters maintain that an inducement and an LOA should be physically separate documents.¹⁸ Although some of these parties cite consumer complaints as the impetus for this position, no commenter maintains that the bulk of consumer complaints received relate to confusion about inducements. Only Southwestern Bell Telephone Company goes further and suggests that it be required that the LOA and the inducement be sent in different mailings.¹⁹ Not one party took the extreme position that the Commission prohibit the use of inducements entirely. Given that no evidence demonstrates substantial incidence of confusion surrounding inducement-oriented LOAs, Commission action based on these assertions is unwarranted.

In addition, requiring that LOAs be on a separate piece of paper from inducements will result in substantially increased costs to IXC's, especially to smaller IXC's. These costs will inevitably be passed to the consumer by way of more expensive long distance charges or a substantial reduction in the development of new services. Furthermore, the proposed prohibition against inducement-oriented LOAs will cripple small IXC's' ability to survive in competition with larger carriers, especially the "Big Three." To maintain the level of competition that currently exists, the Commission must inspire efficiency and innovation in the long distance telecommunications industry by resisting pressure to increase excessive government regulation.

The Commission's laudable goal in initiating this NPRM was to develop rules and regulations to eliminate customer confusion about the purpose of the LOA document itself. The Commission's existing LOA content requirements achieve this goal regardless of whether an LOA uses specific, designated language or is accompanied by an inducement or other incentive. Commenters to the NPRM almost unanimously agree that if the LOA is clearly labeled and

¹⁸See Comments of National Association of Attorney's General, Consumer Action, the California Public Utilities Commission, the New York Public Service Commission, LDDS, CompTel, NYNEX and GTE.

¹⁹Comments of Southwestern Bell Telephone Company at page 3.

informs the consumers that they are authorizing a change in their PIC,²⁰ it is irrelevant that the document also contains a promotion, contest or other inducement.

b. Name Restrictions

Again, no nexus has been established between consumer confusion as to their long distance carrier and multiple carrier names on an LOA. The LOA should clearly and unambiguously identify the customer's PIC. However, the Commission should not require a long distance service provider to identify the name of any other IXC on the LOA document. Moreover, so long as any other IXC's role is clearly defined, the Commission should not prohibit its inclusion.²¹

Many consumers may insist that their underlying service be provided by a "name brand" carrier regardless of who sets the rates for or bills their service. As such, limiting the name on the LOA to the rate-setting or billing IXC will restrict joint marketing efforts between such carriers and the IXC providing the underlying transmission services. The decision of whether to place additional carriers' names on the LOA should remain with the PIC.

B. Other Unauthorized Conversion Issues

1. Residential and Business Customers Should Be Treated Alike

Only three commenters disagreed with the position that additional rules regarding business LOAs are unnecessary.²² They maintain that "many PIC disputes arise when an LOA is executed by a business employee lacking the appropriate authority."²³ The New York Public

²⁰See Comments of ACTA at page 6.

²¹See Comments of CompTel at page 7.

²²Southwestern Bell Telephone, New York Public Service Commission and the National Assoc. of Attorneys General.

²³See Comments of Southwestern Bell at page 5.

Service Commission even goes so far as to say that "it should be the responsibility of the soliciting IXC to determine that it has the proper authorization."²⁴

An IXC should be permitted to rely on a person who holds him or herself out as authorized to institute a PIC change. Stated differently, if an employee maintains to an IXC that he or she has the authority to make a PIC change for his or her company, the IXC should be able to rely on that assertion. Otherwise, the IXC would become engaged in an employee policing role that properly belongs to employers.

2. Consumers Should Be Liable for the Amount They Would Have Paid If Their PIC Had Never Been Changed

Consumers should be liable for the charges billed to them by the unauthorized IXC to the extent of the amount the consumer would have paid if their PIC was never changed. This requirement protects a consumer against unanticipated charges but prevents the customer from receiving a windfall as a result of the disputed PIC change. Parties advocating releasing a customer from any responsibility ignore the fact that many PIC change disputes arise from unintentional "human error" in implementing the PIC change, "buyer remorse," or, more frequently, claims of unauthorized conversion when one member of a family or business agrees to make a PIC change and another individual subsequently disagrees with the change, despite the use of a clear and unambiguous LOA. Finally, the Commission should not reward and encourage "long distance surfers" - customers who "surf" from carrier to carrier in order to collect various incentives (usually checks) or who make unwarranted claims of unauthorized PIC changes in order to get out of paying for long distance charges knowingly incurred.²⁵

²⁴See Comments of the New York Public Service Commission at page 4.

²⁵See Comments of Allnet at page 12. In fact, in its comments, Allnet maintains that an IXC should be liable for a full refund only when the FCC, after responding to a formal complaint, finds that an unauthorized conversion has taken place. In addition, Allnet asserts that the

(Footnote continued to next page)

The Commission cannot assume that all disputed PIC changes are the fault of the carrier. A customer should be responsible for the long distance charges he or she expected to incur and not be able obtain a windfall by claiming an unauthorized conversion. Allowing a consumer to be absolved of all long distance charges or imposing a fine on an IXC for making a later disputed PIC change will only result in more complaints and abuse in the PIC change process.

3. The Commission's Telemarketing Rules Should Not Apply to PIC Changes Obtained by A Consumer's Use of an IXC's 800 Number

The offering of an 800 general information number for an IXC is an explicit advertisement to consumers about that IXC's long distance services. Therefore, a consumer initiating a call to an IXC's 800 number is "shopping around" for a new long distance provider. Consequently, it can be assumed that if, during the course of that telephone call, a consumer chooses to make a PIC change, the consumer did so in an informed and consensual manner.

As the Commission stated, "a customer has the option of independently contacting the IXC to make arrangements for long distance service,"²⁶ and a "customer-initiated PIC change"²⁷ is "an order to change a customer's PIC that is generated as a result of a communication to an IXC or LEC originated by a customer." Adequate safeguards exist to protect consumers from unauthorized conversions. Moreover, the fact that LOAs must be retained for dispute resolution purposes provides a strong incentive for the long distance carrier to obtain LOA authorization in

(Footnote continued from previous page)

complaining customer should be required to sign a sworn, notarized statement when he or she complains of being improperly PIC'd, that cites the penalties that may be imposed on those who commit fraud by making misrepresentations to the Commission.

²⁶*In re Investigation of Access and Divestiture Related Tariffs*, CC Dkt. No. 83-1145, Phase I, 101 FCC 2d 911, 929 (1985) ("Allocation Order"), *recon. denied*, 102 FCC 2d 503 ("Reconsideration Order").

²⁷*In re American Telephone and Telegraph, Petition for Rule Making, Notice of Proposed Rule Making*, 6 FCC Rcd. 1689 (March 14, 1991).

writing prior to conversion. Thus, there is no need to extend the telemarketing PIC change procedures to consumer-initiated PIC changes obtained through an IXC's general information 800 telephone number.

**C. The Commission Should Preempt Conflicting State
LOA Requirements**

Regardless of what federal LOA regulations are imposed, the Commission should ensure uniformity in state regulations regarding the content and form of LOAs. Allowing states to promulgate their own individualized LOA form and content requirements would impose undue administrative and financial burdens on all carriers, particularly small resale carriers with minimal advertising budgets.

Commenters identified two states that are currently reviewing their own rules regarding LOAs and have proposed new rules that may conflict with existing federal LOA requirements.²⁸ The Commission has authority over all interstate telecommunications services and intrastate telecommunications services when, like in the PIC change process, the two are impossible to separate.²⁹ In these cases, the FCC is empowered to preempt state regulations that would negate their objectives.³⁰ Any conflicting state rules regarding LOAs and PIC changes should be preempted.

²⁸See In re Proposed Revisions to Rule 25-4.118, F.A.C., Interexchange Carrier Selection, Docket No. 94 1190-TI (Dec. 15, 1994) (Florida); South Carolina PSC Docket No. 94-559-C, Re: Proceeding Addressing Marketing Guidelines for Telecommunications Carriers.

²⁹*Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986); See also *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 (D.C. Cir. 1989).

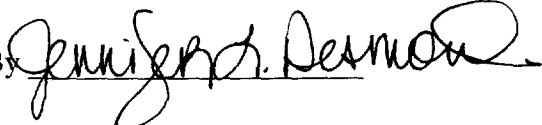
³⁰*California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990).

III. Conclusion

The NPRM proposes a significant number of PIC change rules that would unreasonably restrict an IXC's ability to market its services. The existing PIC change rules have worked remarkably well. The fact that the Commission received only 1,700 PIC change complaints in 1993 and 2,500 complaints in 1994 in relation to the millions of PIC changes executed each year indicates that there is no widespread "PIC change problem" requiring industry-wide PIC change reform, as suggested by the NPRM. Importantly, neither the Commission nor any commenter has connected the complaints to any particular regulatory solution. The regulations proposed by the Commission will therefore impose unnecessary cost burdens and marketing limitations on small long distance carriers with little or no benefit to consumers. In sum, the Commission will best achieve the consumer protection objectives that underlie the NPRM by leaving the present PIC change rules unaltered.

Respectfully submitted,

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Dated: February 8, 1995

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments to the Commission's Notice of Proposed Rule Making has been sent by United States first class mail, postage prepaid, or by hand-delivery, this 8th day of February, 1995, to the following:

Formal Complaints Branch
Federal Communications Commission
Enforcement Division
Common Carrier Bureau
Plaza Level
1250 23rd Street, N.W.
Washington, D.C. 20554

International Transcription Services
Room 140
2100 M Street, N.W.
Washington, D.C. 20037

Simin Barbour

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A handwritten signature in cursive script, reading "Simin Barbour".

Simin Barbour

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HEADLINE: Telephone Price War Heats Up

BYLINE: By EDMUND L. ANDREWS

BODY:

The Sprint Corporation raised fears on Wall Street yesterday that it was setting off a bigger price war in the long-distance telephone industry by offering flat prices to replace the highly complex discount programs that have long been the staple of the industry's big companies.

The seemingly simple move -- announcing a flat price of 10 cents a minute for nighttime and weekend calls and 22 cents on weekdays -- offers only a modest reduction in the average prices charged by AT&T and MCI Communications.

But the move represented a potentially big departure in strategy, laying prices out in the open rather than cloaking them behind a blitz of volume discounts, rewards of "frequent flier" airline miles and \$50 checks to people who switch carriers.

Sprint's move, announced late Thursday as a counterattack to AT&T's huge and highly successful marketing campaign of recent months, jolted the stocks of both AT&T and MCI. In heavy trading, AT&T's shares dropped \$1.375, to \$48.25, while MCI's shares fell 93.75 cents, to \$18.0625. Sprint stock, by contrast, gained 50 cents, to \$27.125.

"The big event is Sprint's new fixed-price scheme, since base rates will no longer be invisible to customers," said Daniel P. Reingold, a telecommunications analyst at Merrill Lynch. "If ATT and MCI find themselves having to match Sprint's fixed-price scheme, then base rates will no longer be invisible to customers and it will be very difficult to raise them."

The new twist comes as the three long-distance carriers are embroiled in a fierce marketing war. Earlier this year, AT&T rolled out a \$150 million advertising campaign, offered an aggressive new package of discounts called True Savings and literally bought thousands of customers by offering them checks for as much as \$75 to abandon MCI or Sprint.

The effort was highly successful, bringing AT&T more than a million new customers in 1994. In the last three months of the year, analysts say AT&T expanded its market share slightly for the first time since the breakup of the Bell System. AT&T commands about 60 percent of the market, while MCI has nearly 20 percent and Sprint has 10 percent. Hundreds of smaller carriers serve the remaining customers.

Until Sprint's move, the big three carriers had pursued a similar strategy. Each offered an array of discount plans -- Friends and Family from MCI, True

The New York Times, January 7, 1995

Savings from AT&T and the Most plan from Sprint -- but each also offset the cost of its plan by inching up the price of basic service.

During the last year, basic rates climbed at least 3 percent in a series of rate increases. Typically, AT&T was first to raise prices, while MCI and Sprint essentially followed in lockstep.

The discount plans do benefit many consumers, though calculating the true bottom line on the price of long-distance service is as fiendishly difficult as figuring out the price of airline seats. As a result, the plans are difficult for many consumers to compare. Mr. Reingold of Merrill Lynch estimates that real prices have in fact declined about 4 percent in the last year but savings vary widely among individual customers.

Executives at both AT&T and MCI dismissed concerns about Sprint's latest move, though executive at both companies spent much of Thursday night analyzing possible pricing programs on their computers.

"It's a slick marketing move, but I don't think it's an effective value proposition for the consumer," said Joseph P. Nacchio, president of AT&T's consumer communications division. Mr. Nacchio, who orchestrated the company's newly aggressive marketing effort, said AT&T's prices were in fact competitive with the new Sprint offering.

Mr. Reingold of Merrill Lynch agreed, estimating that the three big long-distance carriers have been charging about 11 cents a minute for calls at night and on weekends, or only a penny more than Sprint's new price.

But the difference is that the price competition could now become more intense, because rivals will be tempted to match Sprint's cuts on the base price for all calls.

MCI executives implicitly acknowledged that danger, even as they explained why they saw no need to follow Sprint's example. "To market that singularly on price doesn't give you much room to differentiate yourself," said John G. Donoghue, vice president for marketing at MCI's consumer business division. "You can be easily undercut by someone offering 9 1/2 cents a minute or 8 cents a minute."

LANGUAGE: ENGLISH

LOAD-DATE-MDC: January 7, 1995